

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN ELAINE SLOTA,

Plaintiff-Appellant,

v

JOHN LEO SLOTA,

Defendant-Appellee.

UNPUBLISHED

September 13, 2007

No. 269640

St. Clair Circuit Court

LC No. 02-002811-DO

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's order regarding several liens established in the parties' consent divorce judgment. The liens were to be imposed against defendant's property as security for a lifetime award of alimony to plaintiff. According to the language of the consent judgment, the liens were always to have first priority. Notwithstanding this language, however, the trial court reinterpreted the consent judgment and decided that the liens would be subordinate to other liens on the property. We reverse and remand.

Defendant sought to modify the terms of the consent divorce judgment after having difficulty obtaining loans to satisfy an additional \$310,000 payment due to plaintiff. Defendant asserted that unless the judgment's language was modified, he could not obtain the necessary loans to satisfy this obligation. Citing *Ladue v Detroit & Milwaukee R Co*, 13 Mich 380 (1865), the trial court concluded "that parties may not by agreement create what is not there. They cannot create a debt where there is none and if there is no existing debt that can be enforced there can be no lien to which priority can attached." The trial court then ruled:

Because this case involves periodic alimony as opposed to alimony in gross, a debt occurs only at the time the obligation is due, in this case the first of each month. If that obligation is paid when due there is no debt that can be enforced and as such no lien, notwithstanding the language of the judgment

The practical effect of this ruling as to the issues to be addressed by this court in this case is that so long as the support obligation of the defendant is paid current the only lien in existence as a result of this judgment of divorce is the lien for the \$310,000 aforementioned. There is no lien for future alimony payments until and if those alimony payments are not made at which time a lien will attach but be subordinate to any intervening perfected mortgage or lien.

The trial court issued an order consistent with this ruling. The court ordered that the liens for future spousal support against defendant's property "do not exist except as otherwise provided herein as long as spousal support payments and health care premiums are current and paid when due on the first day of each month."¹ The court ordered that upon default by defendant, plaintiff's liens "shall automatically attach to Defendant's assets for the amounts due but unpaid without the necessity to re-record said liens," that liens for past-due and unpaid spousal support "shall be subordinate to any intervening perfected mortgage or lien," and that plaintiff's lien against defendant's property in satisfaction of the \$310,000 award "shall continue."

Plaintiff argues that the language of the divorce judgment is unambiguous, freely agreed to, and not contrary to law, and that the trial court erred when it reinterpreted and changed the terms of the liens. We agree.

Judgments entered pursuant to the agreement of the parties are in the nature of a contract, rather than a judicial order entered against one party. *MacInnes v MacInnes*, 260 Mich App 280, 289; 677 NW2d 889 (2004). A settlement agreement is a contract, and must be construed and applied as such. *Id.* Contract interpretation is reviewed de novo. *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 141; 706 NW2d 471 (2005). We also review de novo a trial court's determination whether a contract term is ambiguous. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003).

The primary goal in contract interpretation is to honor the intent of the parties. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). The intent of the parties is found in the words of the contract, and a court may not use extrinsic evidence to determine intent if the words are clear and unambiguous. *Id.* A contract is ambiguous if its terms may reasonably be understood in different ways. *Id.* Courts may not find ambiguity where none exists. *Id.*

Defendant claims the language of the consent judgment, which made the liens first in priority, caused his difficulties with obtaining financing. Defendant suggests that he did not foresee these difficulties, and that the consent judgment was therefore based on a mistake. However, the lien terms were clearly and unambiguously stated in open court, and both parties agreed to them. And even if defendant did not foresee the difficulties with obtaining loans, a unilateral mistake is no basis to reform a contract. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006).

Further, we note that even if the trial court strictly lacked the authority in and of itself to make all of the liens first in priority, "parties to a divorce are free to reach an agreement that the trial court lacks the authority to compel." *Bolen v Lobaina*, 267 Mich App 415, 421; 705 NW2d 34 (2005). It is well settled that parties can create liens by contract or agreement. *Wiltse v Schaeffer*, 327 Mich 272, 282; 42 NW2d 91 (1950). Thus, the only power the court had in this

¹ In the judgment of divorce, increases and decreases in plaintiff's health insurance premiums were linked to the alimony award.

case was to enforce the unambiguous terms of the parties' agreement. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005).

The trial court relied heavily on *Ladue*, which held that mortgages have no legal effect as liens upon land if there is no "debt, liability, or obligation" secured by the mortgage. *Ladue*, *supra* at 396. But the scenario presented in *Ladue* is not analogous to the facts of this case. The divorce settlement agreement in this case established a present, ongoing liability for alimony that was not a "shadow without substance." *Id.* It was not theoretical, it was not optional, and did not depend upon some future agreement. It was also not a "new" debt that was incurred each month when due. While it is manifestly true that plaintiff could die at any time, the mere fact that an intervening event like plaintiff's death could end defendant's alimony obligation simply does not make the overall obligation theoretical, optional, or contingent.

The trial court also looked to certain provisions of the support and parenting time enforcement act (SPTEA), MCL 552.601 *et seq.*, which provides for a subordinate lien against the payer's personal or real property to satisfy a spousal support arrearage. MCL 552.27,² 552.625a,³ 552.625b.⁴ However, SPTEA does not limit the ability of parties to come to their

² MCL 552.27 provides in pertinent part:

If alimony or an allowance for the support and education of the children is awarded to either party, *the amount of the alimony or allowance constitutes a lien upon the real and personal estate* of the adverse party as provided in section 25a of the support and parenting time enforcement act [Emphasis added.]

³ MCL 552.625a provides in pertinent part:

(1) The amount of past due support that accrues under a judgment as provided in section 3 . . . constitutes a lien in favor of the recipient of support against the real and personal property of a payer. . . . *The lien is effective at the time that the support is due and unpaid* and shall continue until the amount of past due support is paid in full or the lien is terminated

* * *

(3) A lien created under subsection (1) *is subordinate to a prior perfected lien*. . . . [Emphasis added.]

⁴ MCL 552.625b provides in pertinent part:

(1) A remedy provided by this section is cumulative and does not affect the availability of another remedy under this act or other law.

(2) . . . [T]he . . . agency may perfect a lien created under section 25a upon the real or personal property of the payer when an arrearage has accrued in an amount that exceeds 2 times the monthly amount of periodic support payments payable under the payer's support order.

own lien arrangements by mutual agreement. As noted above, parties are indeed free to do so. *Wiltse*, *supra* at 282. The existence of this statutory mechanism simply did not bar the parties from mutually bargaining for other types of liens in their divorce settlement. In fact, MCL 442.625b explicitly provides that “[a] remedy provided under this section is cumulative and does not affect the availability of another remedy under this act or other law.” These statutes provide an alternative means of obtaining a lien to secure payment of support, not the exclusive means.

Next, we note that while the total amount of alimony that will ultimately be payable in this case cannot be precisely calculated in advance, it can be reasonably estimated. “A lien claimant is required to prove by a preponderance of the evidence the amount claimed to be owing to a reasonable certainty.” *Vugterveen Sys v Old Millpond Corp*, 210 Mich App 34, 40; 533 NW2d 320 (1995), rev’d in part on other grounds 454 Mich 119 (1997). This can be done in the present case using plaintiff’s actuarial life expectancy and the monthly alimony amount, in a way similar to the process used for estimating the total value of pension payments. See, e.g., *Kurz v Kurz*, 178 Mich App 284, 292-293; 443 NW2d 782 (1989); *Perry v Perry*, 133 Mich App 453, 458-459; 350 NW2d 275 (1984).

With no legal prohibition against the liens unambiguously agreed to in the consent divorce judgment, and absent any evidence that the agreement was not entered into voluntarily by the parties, the trial court was limited to enforcing the parties’ contractual settlement as written. *Rory*, *supra* at 468. The consent judgment clearly stated that the liens would always be first in priority, and that they would secure the lifetime payment of alimony to plaintiff. Thus, the trial court’s ruling to the contrary was in error.

Reversed and remanded. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Christopher M. Murray